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# In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1310

RUSSELL LEE EPPERSON,
*Petitioner*,

vs.

STATE OF MISSOURI,
*Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

## BRIEF FOR RESPONDENT IN OPPOSITION

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## BRIEF FOR RESPONDENT IN OPPOSITION

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### STATEMENT OF THE CASE

Petitioner was convicted of three counts of murder in the first degree in the killing of his wife, Fern, and his two children, Richard and DeAnn. The jury assessed punishment on each count at life imprisonment and the court ordered the sentences to run consecutively. The conviction was obtained in the Hannibal Court of Common Pleas after a change of venue from the Circuit Court of Audrain County. The convictions arose from the following events:

Petitioner lived with his wife, Fern, and their two children at 608 West Pearson in Mexico, Missouri. On March 24, 1975, Fern's mother, Mrs. Mary Ann Smith, attempted to telephone her daughter at her home. Mrs. Smith called petitioner at his job inquiring about the whereabouts of her daughter. He told her that she and the children had gone to Columbia to do some shopping. This was unusual because Fern usually left the children with Mrs. Smith when she went shopping. The next day, Mrs. Smith tried calling her daughter at home again but received no answer. That evening she and her husband saw petitioner on the town square in Mexico. He told them that Fern was with his mother. However, after Mrs. Smith informed him that Fern and the children were not with his mother, he said that he did not know where they were. After Mrs. Smith went home, she received a call from petitioner who told her that Fern had telephoned him and told him that she would be home in the morning with the children.

On March 26, 1976, at approximately 8:30 a.m., petitioner called Mrs. Smith on the telephone and asked her to come over to his house. She refused at first but then agreed to come. Petitioner informed her that Fern would be there about 9:00 o'clock. At 8:45 a.m., petitioner picked up Mrs. Smith in his pickup truck and took her to his home at 608 West Pearson. As she and the petitioner went into the home, he removed something from a cabinet and kept it behind him while he locked the kitchen door. He then stood against the door facing Mrs. Smith. Petitioner asked Mrs. Smith to go into the living room and told her several times that he would be glad when this was all over. Mrs. Smith spotted her daughter's purse on the dryer and remembered that Fern never left the house without it. Mrs. Smith also smelled a strong sweet odor which she associated with death. After making up



an excuse, she left the house and went to the residence of a neighbor, Mrs. Gloria Mitchell, where someone called the police.

Officer William Schindler of the Mexico Public Safety Department responded to the call and met Mrs. Smith at 810 North Wade, the home of Gloria Mitchell. Mrs. Smith related to Officer Schindler the facts and events described above. Officer Schindler summoned Sergeant Duffner and told him what Mrs. Smith had related. This occurred at 9:34 a.m. While Officer Schindler testified at the hearing on the motion to suppress that Mrs. Smith did not tell him about the odor of death, Mrs. Smith testified that she did tell him. Sergeant Richard Duffner testified that Officer Schindler related to him later that morning that Mrs. Smith had told him about the odor.

Both officers went to 608 West Pearson, knocked on the doors without getting a response, and found that all the windows were covered with drapes or blinds. Sergeant Duffner returned to the police station having ordered Officer Schindler to remain near the house in order to observe if anyone left or entered it. After returning to the police station, Sergeant Duffner commenced an investigation which began with his talking to petitioner's next door neighbor. He learned from her the places of employment of petitioner and his wife and the school in which petitioner's son, Richard, was enrolled. Sergeant Duffner determined that Fern Epperson had been on vacation that week but had not shown up for bowling on Tuesday evening as she usually did. He also discovered from petitioner's employer that petitioner had stated the day before that he had taken his wife to the hospital for Xrays. A call to the Eppersons' family doctor revealed that he had not seen her since December, 1974. The personnel of the school in which Richard Epperson was enrolled

told Sergeant Duffner that a person identifying himself as Russell Epperson had called the school Monday and told them that his son Richard would be absent because of illness. Sergeant Duffner informed Officer Schindler and the chief of police of the results of his investigation. The chief ordered Sergeant Duffner to get in touch with petitioner's parents to find out if they had seen petitioner or to request them to come to the house. The sergeant arranged to meet the parents at petitioner's home. He then stopped by to talk to Mrs. Smith and was informed by her that the local hospital had no record of Fern's having had Xrays.

Sergeant Duffner and Officer Schindler met petitioner's parents at 608 West Pearson shortly thereafter and again failed to get a response by knocking on the doors. Petitioner's father, hereafter referred to as Mr. Epperson, told them that he did not see petitioner's motorcycle there and that he might be riding around on it. After telling the police officers that they would not break into their son's house, the Eppersons went to the home of Mrs. Mitchell, where Mrs. Smith still was present. Officer Schindler then went to the police department where he found out by means of a telephone call that petitioner's motorcycle was found at his place of employment. The chief of police had previously told Duffner and Schindler that they could not break into the house themselves but that perhaps Mr. Epperson could. Officer Schindler called Mr. Epperson at the Mitchell residence and told him about locating the motorcycle without having located the petitioner. Epperson told Schindler that he would give them some help in entering the house. After the telephone call, Mrs. Mitchell heard Mr. Epperson tell them that they had to go and try to get in because if anything had happened his son might be dead also.



The Eppersons and Diffner and Schindler met again at petitioner's home. Petitioner's car and truck were also there. The officers told the Eppersons that if there would be any breaking into the house they should be the ones to initiate the action. Mr. Epperson agreed to help. Mr. Epperson unsuccessfully tried to open the doors with his key and then with a screwdriver. One of the police officers noticed that a window in the south side of the house was unlocked. After Sergeant Duffner got a Phillips screwdriver from petitioner's garage, Mr. Epperson used the screwdriver to take the screws out of the storm window as the officers assisted him by holding the window. All of them helped raise the window and Officer Schindler noticed the odor of decomposing flesh as soon as the window was raised. After a ladder was placed against the window, they pulled the blinds back and saw a human form lying under a sheet on the bed. Mr. Epperson entered the room through the window first with Schindler and Duffner following. The entry was around noon.

The form on the bed appeared to be a body with the sheet pulled up to the back of the head. While Officer Schindler and Mr. Epperson went to the other parts of the house to see if anybody else was there, Sergeant Duffner removed the sheet from the form and discovered the bodies of a nude adult female with two children lying across her back. He showed what he had found to the other two men. The female, Fern Epperson, was lying face down on the bed and the children had nightclothes on and two white plastic bags over their heads. The male child had a cord tied around his neck. A sock was found by Fern's face and another sock was found in the plastic bag over the female child's head. There were no indications of struggle or forced entry.

Sergeant Duffner called his superior officers and then made an investigation of the house. As he walked through the house, he found a five-gallon can of gasoline in the hallway near the bedroom where the bodies were found; he found a chisel for an air hammer partly wrapped in towels in a chair in the living room; and, he found a bottle of chloroform on top of the sewing cabinet in the kitchen. In the Cadillac parked near the house he observed groceries, camping equipment and automobile equipment.

That afternoon a search was begun for the petitioner in the City of Mexico. The search eventually extended throughout Audrain County and several of the surrounding counties. Petitioner was arrested on April 4, 1975, after his father called the sheriff's department and announced that his son was at his house and ready to give himself up.

Tests later revealed that the bottle found in the kitchen of the Epperson home did indeed contain chloroform, as did the socks which were found next to the mother and daughter. Chloroform was also found in the vital organs of the victims. The bodies had been dead for 30 to 72 hours before the autopsies were performed at 5:00 p.m. on March 26, 1975. The bodies showed evidence of blows by a blunt instrument on the head and shoulders, with the male child having suffered a skull fracture from the blows. Fern's cause of death was diagnosed as asphyxia due to the administration of chloroform and smothering, and blows from a blunt object. The male child was found to have died by strangulation from the cord around his neck, from probable smothering by the plastic bag and from the skull fracture. The female child was killed by asphyxia due to the administration of chloroform and smothering by the plastic bag.



A motion to suppress all of the evidence gained as the result of the entry of petitioner's home was filed, and a hearing was held before the Honorable George P. Adams. In addition to the testimony which has been described above, Mr. Epperson stated that he had given no permission for the officers to enter his son's home nor had he voluntarily assisted them. This testimony was despite Mr. Epperson's previous statement given to a police officer on March 26, 1976, in which he stated that he assisted police officers after his wife and Mrs. Smith decided that the house should be broken into. Sergeant Duffner testified that they did not get a search warrant because there was no indication of "foul play". Before entering the home, he had known of no crime which had been committed. Officer Schindler also testified that he had had no idea that a crime had been committed and that he had not been alarmed by anything before entering the house.

The motion to suppress was overruled.

Petitioner entered a plea of not guilty by reason of mental disease or defect, and was found by the circuit court to be competent to stand trial. After psychiatric examinations of petitioner were completed, he withdrew his plea prior to trial and entered a plea of not guilty. A rehearing on the motion to suppress was denied by the Honorable James R. Reinhard, who conducted the trial.

At trial, the state presented evidence of the facts as related above. Petitioner rested without presenting any evidence. The jury found petitioner guilty of three counts of murder in the first degree and assessed his punishment on each count at life imprisonment. The Circuit Court ordered that the sentences run consecutively.

## REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner urges this Court to issue its writ of certiorari for two reasons. First, the medical emergency exception to the Fourth Amendment Search Warrant Requirement has not been clearly delineated or defined by previous United States Supreme Court decisions and, Second, the facts in the instant case do not render the entry into petitioner's home valid as a response to a medical emergency.

It is respondent's position that the medical emergency exception has been sufficiently delineated and recognized by United States Supreme Court opinions to allow it to be applied in an accurate and constitutional manner by lower courts and that the definition of the medical emergency exception is by the nature of its subject matter impossible to delineate more clearly. The right of the police to respond to emergency situations, including medical emergencies, was recognized as well established by the Court in *Mincey* v. *Arizona*, ..... U.S. ....., 98 S.Ct. 2408, 2413-2414, 57 L.Ed.2d 290 (1978):

> "We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. Similarly, when the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises . . . . 'The need to protect or preserve life or avoid serious injury is justification for what would otherwise be illegal absent an exigency or emergency.' " [Footnotes and citations omitted]. See also, LaFave, *Search and Seizure*, Section 6.6(a), pp. 467-473.



The formulation which allows police to respond to emergency situations within dwellings without a warrant when there are reasonable grounds to believe that a person is in need of immediate aid in order to protect or preserve life or avoid serious injury is about as precise as is possible given the fact that emergency situations by their very nature are impossible to anticipate. Given the infinitely varying and random circumstances in life, it would be extremely unwise to attempt to further delineate the description given in *Mincey* of the medical emergency exception unless a legitimate instance of such emergency be inadvertently excluded. This same problem was recognized in regard to the entry of burning premises in *Michigan* v. *Tyler*, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978), wherein the Supreme Court recognized that the general rules established in their opinion would have to be applied on a case by case basis by other courts. *Id.* 436 U.S. at 510, note 6. The Court in *Tyler* attempted no further delineation of when officers may enter and search burning or burned premises other than the broad guidelines given in that opinion. Likewise, no such attempt should be made in the instant case. Any attempt made in this case would be strictly limited to the facts of this case and would be of little precedential value.

Petitioner points out no line of cases which deviates from the Supreme Court's *Mincey* formulation of the emergency rule nor does he point out wherein the Supreme Court of Missouri deviated from that rule in the instant case. Indeed, the Supreme Court of Missouri emphasized the fact that the police needed to find that there was someone who was "in need of immediate help" because

of illness or injury and that in the instant case one or more of the victims of the crime could have been in "immediate need of help to prevent death". *State* v. *Epperson*, 571 S.W.2d 260, 264 (Mo. banc 1978).

In summary, as for the need for this Court to issue its writ in order to define or delineate further the medical emergency exception to the Fourth Amendment search warrant requirement, petitioner has failed to make a convincing case that such an endeavor is needed and has failed to indicate that such would change the analysis utilized by the Supreme Court of Missouri in the instant case.

Petitioner insists, however, that the medical emergency exception, however defined, should not apply to the facts in the instant case because there were no facts within the knowledge of the officers which were sufficient to sustain a reasonable basis that a medical emergency existed and because the officers had concluded that no emergency did exist.[1] Essentially, the facts within the knowledge of the officers are as summarized by the Supreme Court of Missouri:

> "These facts include (1) the defendant's wife and children had been missing several days; (2) defendant had given false and inconsistent explanations [to various persons] for their absence; (3) defendant's unusual, suspicious and nervous manner in the days following the disappearance of his family; (4) an odor of decomposing flesh had been detected in the house,[2] and (5) defendant's unexplained disappearance, though he had been in the house with Mrs. Smith shortly before the police arrived." *State* v. *Epperson, supra*, at 263.

1. During oral argument before the Missouri Supreme Court, petitioner's counsel stated, after describing the information before the officers, "Had there been a search warrant I certainly don't think that I'd be here making any argument that he hadn't had probable cause to obtain a search warrant with that kind of information." He modified this somewhat by stating later that this was not a case presenting a "glaring" set of facts for an emergency. Even though a transcript of the oral argument has not been prepared by that Court, respondent's counsel vouches for the accuracy of the statements as having been at the argument and as having listened to them on the tapes of the argument recorded by the Court.



These facts had also led Epperson's mother and father to conclude, immediately before deciding to go into the house, that if something terrible had happened to the rest of the family then "Russell was dead also." Mr. Epperson later denied saying this.

As pointed out by the Supreme Court of Missouri, these facts are remarkably similar to the facts in the numerous cases cited in *State* v. *Epperson, supra*, at 264, in which it was found that the facts presented a reasonable basis for concluding that there was a medical emergency justifying officers entering a premises without a warrant. Petitioner cites no cases which have, on similar facts, failed to uphold a warrantless entry. Petitioner argues that, because the police delayed several hours before entering the premises, this reenforces petitioner's contention that there was no true emergency. He fails to allude to the fact that the several hours delay was caused by the police officers investigating the whereabouts of Mrs. Epperson and her children as well as of petitioner, which investigation revealed facts further establishing the suspicious nature of the family's disappearance and of petitioner's recent ac-

2. The assertion is made on page four of the petition for writ of certiorari that Mrs. Smith, Fern Epperson's mother, had told Officer Schindler that she had smelled the odor of rotting flesh when in the house that morning but that Officer Schindler denied that he had been told about the unusual odor. Petitioner, however, fails to fully describe the testimony at the suppression hearing. Sergeant Richard Duffner testified that Officer Schindler had in fact related to him that same morning that Mrs. Smith had told him about the odor of death.

tions. It was then that many of the inconsistencies involved in petitioner's previous explanations about the whereabouts of his family and his own lack of availability at his usual place of employment became apparent. It was these additional factors as well as the factors that were already within the officers' knowledge that the Supreme Court of Missouri relied on in concluding that there was a reasonable basis for the officers to have believed that a medical emergency existed at the time that they and Epperson's father broke into the house. This two hour period, then, unearthed facts and circumstances which formed a part of the basis for entry. The implication urged by petitioner that this was a period of several hours in which nothing was done is erroneous.

The question presented by appellant for review involves only the entry of the premises and does not extend to the finding of the bodies or the subsequent observations by one of the police officers in which he found, in plain view, the instrumentalities of the crime and which resulted in photographs being taken. The finding of the items additional to the bodies also does not seem to be a subsidiary question presented by the petitioner since, as analyzed by the Supreme Court of Missouri, it was simply a continuation of the medical emergency circumstance which justified the initial entry.[3] See *Michigan* v. *Tyler, supra.* None of the egregious circumstances which existed either in those searches in *Tyler* which occurred more than a day after the fire and those searches in *Mincey* which occurred over a several day period and involved ripping up the residence are found in the instant case. Here, appellant's where-

3. In fact during oral argument before the Supreme Court of Missouri petitioner's attorney stated that this further "search" was justified if the initial entry was. Even though no transcript was prepared of the oral argument, counsel for respondent was present then and has listened to the Court's tapes of the argument to insure the accuracy of this assertion.



abouts had not been determined nor had it been determined that there was evidence in the house which was safe from removal or destruction. The officer was certainly justified in looking for evidence, such as the instrumentalities of the crime which he found, in view of the fact that people would be coming to take the bodies to either the hospital or funeral home and that other people would also be present in the house who may inadvertently or deliberately remove or destroy evidence. Because this is not a question presented by the petitioner, respondent will not engage in a more thorough discussion of it.

The third question addressed by the Missouri Supreme Court, concerning the subjective conclusion of the police officers that no reasonable basis existed indicating a medical emergency, is not explicitly presented as a question for review by a petitioner. Although he alludes to the fact that the officers did not conclude that a medical emergency existed, this fact is used to corroborate his own assertion that the facts presented by the case cannot serve as a reasonable basis for the medical emergency exception. However, this question might be one which this Court would treat as a subsidiary question of the issue presented for review. Numerous other courts have considered it necessary to determine whether the subjective erroneous determination of the police officers concerning the legality of a search or arrest is controlling on the reviewing court or whether an objective test should be applied. Therefore, respondent will treat this as a subsidary question.

Respondent contends that the issue of whether or not the subjective determination by the police officers on whether or not a medical emergency existed should be binding on a reviewing court should not be the basis for the issuance of the writ of certiorari since the Supreme Court of Missouri's decision was based upon and in ac-

cordance with principles firmly established by this Court. The Supreme Court of Missouri held that "objective reasons alone suffice to uphold either an arrest or a search" unless "the police officers' subjective motives were demonstrably in bad faith." *State* v. *Epperson, supra,* at 265. While there is no United States Supreme Court case in which a subjective decision by officers as to the lack of justification for a search or arrest has been ignored in favor of justifying their actions on objective grounds, the Missouri Supreme Court's position is in accord with applicable decisions by this Court in which this Court set forth an objective standard to be used to review officers' actions. In *Terry* v. *Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) this Court held that the reasonableness of a particular search should be judged against an objective standard, that is,

> "would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Id.* 392 U.S. at 21-22.

Other jurisdictions which have considered the question have, practically unanimously, relied on the language in *Terry* or on similar language in other United States Supreme Court cases to uphold arrests and searches made despite subjective determinations by police officers which could not have supported their actions. *Klingler* v. *United States,* 409 F.2d 299, 304-305 (8th Cir. 1969); *cert. denied,* 396 U.S. 859 (1969); *State* v. *Vanzant,* 14 Wash. App. 679, 544 P.2d 786, 788 (1975); *Payne* v. *United States,* 111 U.S. App. D.C. 94, 294 F.2d 723, 725 (1961); *cert. denied,* 368 U.S. 883 (1961); *United States ex rel. Senk* v. *Brierly,* 381 F.Supp. 447, 463 (M.D.Penn. 1974); *affirmed without opinion,* 511 F.2d 1396 (3rd Cir. 1975); *cert. denied,* 423 U.S. 843 (1975); *United States* v. *Carr,* 445 F.Supp. 1383,



1386-1387 (D.Con. 1978), and authorities cited therein. Similar holdings from numerous jurisdictions will be found in Appendix A of this response. Commentators have also adopted this as the correct view. See LaFave, *Search and Seizure,* §3.2, pages 460-461.

Such a universal interpretation of United States Supreme Court opinions show that the writ should not be issued to review this question because the law of this Court is being uniformly interpreted and applied by the federal and state jurisdictions throughout this country. In fact, petitioner never directly attacks the validity of the Missouri Supreme Court's holding on this issue nor does he cite contrary authority.

## CONCLUSION

WHEREFORE, respondent respectfully requests that this Court deny the petition for writ of certiorari to the Missouri Supreme Court.

Respectfully submitted,

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## APPENDIX A

Decisions approving the principle that the subjective determination by the police officer that probable cause for an arrest or search did not exist is not binding on the reviewing court are as follows:

*United States ex rel. LaBelle* v. *LaVallee*, 517 F.2d 750, 754 (2nd Cir. 1975); *cert. denied*, 423 U.S. 1062 (1976);

*United States* v. *Day*, 455 F.2d 454, 456 (3rd Cir. 1972);

*State in Interest of J. B.*, 131 N.J. Super. 6, 328 A.2d 46, 42 (1974);

*State* v. *Donnell*, 239 N.W.2d 575, 578 (Ia. 1976).

This principle has also been approved in cases in which a defendant has attacked the legality of the search or arrest on the basis that the officer did not later testify as to which theory he was basing his actions on.

*Dodd* v. *Beto*, 435 F.2d 868, 870 (5th Cir. 1970); *cert. denied*, 404 U.S. 845 (1971);

*Guzman* v. *Estelle*, 493 F.2d 532, 536 (5th Cir. 1974);

*Commonwealth* v. *Donnelly*, 233 Pa.Super. 396, 336 A.2d 632, 637 Note 3 (1975); *cert. denied*, 424 U.S. 974 (1976).

For decisions upholding this principle on the basis that it was amenable with the rationale behind the Fourth Amendment exclusionary rule, see the following:

*State* v. *Zito*, 54 N.J. 206, 254 A.2d 769, 771-772 (1969);

*United States* v. *Darrow*, 499 F.2d 64, 69 (7th Cir. 1974); *cert. denied*, 419 U.S. 1013 (1974).

The following cases stand for the application of this principle to situations in which police officers acted, or the court assumed they acted, on erroneous conclusions as to the extent of their authority to arrest or search:

*United States* v. *Imbruglia*, 397 F.Supp. 1206 (D.Mass. 1975);

*United States* v. *Vital-Padilla*, 500 F.2d 641, 644 (9th Cir. 1974);

*United States* v. *Gilbert*, 378 F.Supp. 82, 87 (D.S.D. 1974);

*Bailey* v. *United States*, 279 A.2d 508, 511 (D.C.Ct.App. 1971).

Relying on the above principle, the following cases have held that a search of an automobile which would have been justified without a warrant was not rendered invalid simply because the officers relied on a legally insufficient warrant:

*United States* v. *Darrow*, 499 F.2d 64, 69 (7th Cir. 1974); *cert. den.*, 419 U.S. 1013 (1974);

*White* v. *United States*, 448 F.2d 250, 254 (8th Cir. 1971); *cert. den.*, 405 U.S. 926 (1972).

The courts in the following opinions have found that an arrest or search is not illegal simply because the determination of probable cause by the officer was partially the result of his considering illegal factors if other facts within his knowledge would also have established probable cause:

*Smith* v. *United States*, 402 F.2d 771, 772 (9th Cir. 1968);

*United States* v. *Skinner*, 412 F.2d 98, 102 (8th Cir. 1969); *cert. den.*, 396 U.S. 967 (1969);

*State* v. *Waltz*, 61 N.J. 83, 293 A.2d 167, 170 (1972).



Courts also have found that a warrantless arrest made on a misdemeanor charge which would call for the authority of a warrant would not be rendered invalid if there was probable cause to believe that a felony had been committed which would not require the authority of a warrant:

*State* v. *Zito*, 54 N.J. 206, 254 A.2d 769, 771-772 (1969);

*United States* v. *Rickus*, 351 F.Supp. 1379, 1382 (E.D. Pa. 1972); *affirmed*, 480 F.2d 919 (3rd Cir. 1973); *cert. den.*, 414 U.S. 1006 (1973).

Courts have also upheld searches and arrests because there were facts within the knowledge of arresting officers which would have justified arrests on legal grounds even though the grounds stated at the time of the action by the officers did not provide legal justification:

*Commonwealth* v. *Miller*, 318 N.E.2d 909, 911 (Mass. 1974);

*United States* v. *McCoy*, 517 F.2d 41, 43, n. 1 (7th Cir. 1975); *cert. den.*, 423 U.S. 895 (1975);

*State* v. *Wade*, 206 Kan. 347, 479 P.2d 811, 813 (Kan. 1971);

*State* v. *Spry*, 87 S.D. 318, 207 N.W.2d 504, 509 (1973);

*United States* v. *Dunavan*, 485 F.2d 201, 205 (6th Cir. 1973).

See also, *Sirimarco* v. *United States*, 315 F.2d 699, 702 (10th Cir. 1963); *cert. den.*, 374 U.S. 807 (1963); for the following proposition:

> "A lawful search, though not made under subjective claim or knowledge of right, remains lawful and evidence so obtained is admissible."